No. 90-131

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

COLUMBIA GAS TRANSMISSION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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TABLE OF AUTHORITIES

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The brief in opposition filed by respondents Columbia Gas Transmission Corporation, et al., is devoted almost entirely to the submission that the Court should not grant plenary review in this case. See Columbia Br. in Opp. 14-21. However, we do not urge the Court to grant plenary review, on the basis of either our own petition or the petition filed by the affected pipelines, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990). Instead, we suggest that both petitions be held and disposed of in light of the

Court's disposition of *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016 (filed June 22, 1990) (*AGD II*), and the other certiorari petitions seeking review of the decision of the D.C. Circuit in that case (see Pet. 13 n.8). Respondents have offered no persuasive reason for rejecting our modest suggestion.

1. This case involves the validity of Commission orders permitting five natural gas pipelines to pass through to downstream customers, based on their past purchases of gas, various costs that the pipelines themselves had been required to pay producers for their purchase of the same gas. The Commission found "good cause" for waiving the notice requirement in Section 4(d) of the Natural Gas Act (NGA) in order to permit the pipelines to place the rate increases in effect as of 1980, when the Commission had imposed an interim moratorium on the filing of applications to recover the costs.

In setting aside the Commission's orders, the D.C. Circuit did not hold that Section 4(d) of the NGA absolutely bars the Commission from granting a waiver that permits a rate increase to be given an effective date prior to when it was filed with the Commission. To the contrary, the court below acknowledged that it had sustained a waiver having that effect in a prior case, Pet. App. 10a-11a (citing *City of Piqua* v. *FERC*, 610 F.2d 950, 954-955 (D.C. Cir. 1979)),[1] and other courts of appeals likewise have held that Section 4(d) permits the Commission to grant such a waiver. *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983); *Towns of Concord & Wellesley* v. *FERC*,

[1] "Pet. App." refers to the petition for a writ of certiorari in No. 89-2001.

844 F.2d 891, 896-897 (1st Cir. 1988). Because the court below did not reject the Commission's interpretation that Section 4(d)'s waiver provision allows a pre-filing effective date, and because there is in any event no circuit conflict on that issue, we do not believe that it warrants review. Although respondents question (Columbia Br. in Opp. 18 & n.22) the continuing validity of *City of Piqua*, *Hall*, and *Towns of Concord & Wellesley* after *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), they likewise do not ask the Court to grant review on the scope of Section 4(d)'s waiver provision in this regard.[2]

2. As we have explained (Pet. 16-18), the court of appeals' decision in this case rested on a different ground. It faulted the Commission for failing to notify the pipelines' downstream customers in 1980 that they might later be billed an additional amount to cover costs of producing the gas they were purchasing. See Pet. App. 10a-11a, 13a. The court of appeals made clear that this notice was distinct from the "statutory notice" required by (and subject to waiver under) Section 4(d) of the NGA. Pet. App. 10a. Contrary to the court's view, however, the

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[2] We do not believe that *Maislin* has any bearing on the scope of the Commission's waiver authority in this case, since the Court specifically declined to express a view on the Interstate Commerce Commission's actions under the corresponding provision of the Interstate Commerce Act, 49 U.S.C. 10762(c), which is worded differently from Section 4(d) of the NGA. See 110 S. Ct. at 2770 n.14. The effect, if any, of *Maislin* on the Commission's waiver authority under Section 4(d) of the NGA may be considered by the D.C. Circuit if, as we urge, the Court vacates the judgment below and remands the case for further consideration in light of its ultimate disposition in *AGD II*.

NGA's prohibition against retroactive rate increases instituted by a pipeline derives from Section 4(d).[3] In holding that the prohibition instead exists independently of Section 4(d), and then fashioning an extra-statutory notice requirement to enforce this unanchored prohibition, see Pet. 17-18; Pet. App. 10a, 11a, 13a, the court adhered to the approach it followed in *AGD II*, where it likewise invoked a judicially fashioned version of the filed rate doctrine that is not rooted in the text of the NGA. See 89-2016 Pet. 13-15, 18-19, 21-25; 89-2016 Reply Br. 4-8. It is for this reason that we suggest the Court hold the petitions in this case pending the disposition of *AGD II*.

Respondents' objections to our suggestion are insubstantial. First, they argue (Columbia Br. in Opp. 22) that *AGD II* is distinguishable because it does not involve the Commission's waiver authority under Section 4(d). But as we have just explained, the court below did not hold that Section 4(d) itself bars the Commission from granting a waiver that permits a rate increase to be given a pre-filing effective date; the court instead invalidated the rate increase because the Commission did not comply with notice requirements that the court found to exist independently of Section 4(d) and that therefore were unaffected by a waiver under Section 4(d).

Second, respondents assert (Columbia Br. in Opp. 23) that there is no "reason to expect that any fore-

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[3] Contrary to respondents' suggestion (Mun. Def. Grp. Br. in Opp. 9), this Court distinguished between Sections 4(d) and 5(a) of the NGA in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981), and it specifically reserved the question whether the Commission could grant a waiver under Section 4(d) to permit a pre-filing effective date in the circumstances of that case, 453 at 578 n.8.

seeable disposition by the Court of [the] petitions [in *AGD II*] would affect the holding of the court of appeals in this case." But as we explain in the petition (at 19), if the Court grants certiorari in *AGD II* and reverses the D.C. Circuit's decision in that case because it was not based on the text of the provisions of the NGA (including Section 4(d)) that comprise the filed rate doctrine—and if the Court then remands this case for further consideration in light of *AGD II*—it will be clear to the D.C. Circuit that the NGA's only prohibition against retroactive rate increases instituted by a pipeline is contained in Section 4(d). Under its own precedent in *City of Piqua*, which construed Section 4(d)'s waiver provision to permit a rate increase having a pre-filing effective date, the D.C. Circuit would be required to consider on remand whether the Commission reasonably determined that there was "good cause" for permitting a pre-filing effective date in this case. There is no reason to assume that the court would disagree with that determination, in view of the Commission's statement when it imposed the moratorium in 1980 that producers would be permitted to recover the costs from pipelines on a retroactive basis, the changes in the natural gas industry since that time, and the fact that the costs were incurred by producers and paid by pipelines for the benefit of downstream customers such as respondents. See also Pet. 10, quoting Pet. App. 13a (Commission "may well be correct in its assessment of the equities").

Third, respondents erroneously contend (Columbia Br. in Opp. 20, 23) that this case is unrelated to *AGD II* because it does not arise out of the massive restructuring of the natural gas industry in the 1980s. Although respondents are correct that the

Commission's original orders allowing the pipelines to recover the costs by direct billing of downstream customers preceded the Commission's Order No. 436,[4] which was designed to encourage pipelines to assume open-access status, the pipeline petitioners correctly point out (89-2001 Reply Br. 7-8) that those orders came *after* Order No. 380,[5] which eliminated variable-cost minimum bills in pipeline tariffs and was the first major step in restructuring the natural gas market. See 89-2016 Pet. 6. And of course the waiver orders in this case were issued by the Commission in 1988, Pet. App. 15a, well after Order No. 436. Thus, the orders in this case and in *AGD II* arose out of the same regulatory and market climate.[6]

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition

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[4] FERC Stats. & Regs., Regulations Preambles [1982-1985] ¶ 30,665 (Oct. 18, 1985).

[5] FERC Stats. & Regs., Regulations Preambles [1982-1985] ¶ 30,571 (June 1, 1984), aff'd *sub nom. Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986).

[6] The basis for holding the petitions in this case pending the disposition of *AGD II*, rather than denying certiorari, is reinforced by the recurring nature of the issue. In *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 580 n.7 (1990), the D.C. Circuit relied on its decision in the instant case in holding that the Commission could not allow certain charges by waiving the notice requirement in Section 4(d). On August 29, 1990, we filed a petition for a writ of certiorari in the *Transwestern* case, suggesting that the petition be held and disposed of in light of the Court's disposition of the petitions in *AGD II* and the instant case. *FERC* v. *Public Utilities Comm'n of California*, No. 90-367. The affected pipelines also have filed a certiorari petition in that case. *Transwestern Pipeline Co.* v. *Kansas Power & Light Co.*, No. 90-344 (filed Aug. 24, 1990).

for a writ of certiorari (and the petition filed by the pipelines in this case, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990)) should be held and disposed of as appropriate in light of the Court's disposition of the petition for a writ of certiorari in *FERC* v. *Associated Gas Distributors*, No. 89-2016 (filed June 22, 1990), and the other certiorari petitions seeking review of the judgment of the District of Columbia Circuit in that case.

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SEPTEMBER 1990

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* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20113